TANJUNG TIARA SDN BHD

v.

PARAGRO SDN BHD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: Q-02-3044-2009]
24 SEPTEMBER 2010

CONTRACT: *Termination - Unilateral termination - Sale and purchase of merchantable timber - Termination by seller on ground that licence application to extract timber rejected by Ministry of Resource Planning - Licence to take forest produce in fact issued by Sarawak Forestry Department - Whether seller's termination in view thereof amounted to breach of contract - Whether buyer's entitlement to RM120,000,000 in damages justified*

The defendant company (the appellant herein) was the registered proprietor of an approximate area of 12 acres of land held under Lot 63 in the Sawai Land District Batang Suai, Miri Sarawak ('Lot 63'). The defendant entered into a sale and purchase agreement ('SPA') with the plaintiff company (the respondent herein) for the plaintiff to purchase and the defendant to sell all extracted merchantable timber from Lot 63, subject to a timber licence to fell and extract all the merchantable timber ('licence') granted by the relevant authority. It followed that the Director of Forestry Sarawak approved the defendant's application for the licence. Subsequently, however, the defendant's controlling shareholders unilaterally terminated the SPA on the ground, *inter alia*, that the Ministry of Resource Planning rejected the defendant's application for the licence. The plaintiff then brought an action against the defendant for breach of contract in the High Court. The trial judge gave judgment for the plaintiff in the sum of RM120,000,000 in damages with interest. The defendant now appealed.

Held (dismissing the appeal):
Per Low Hop Bing JCA delivering the judgment of the court:

(1) Both the SPA and the licence referred to the same parcel of land, *ie*, Lot 63 and the same subject matter, *ie*, merchantable timber. Both the documents must be read conjunctively in line

with the approach taken by the Court of Appeal in *T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah*, *ie*, that in transactions where more than one document or instrument was involved, the courts would usually construe those documents together, and where the parties' intentions were clearly and unequivocally expressed, the courts would give effect to it. Following the conjunctive approach, the trial judge was correct in holding that the licence was within the ambit, scope and meaning of the phrase "timber licence" referred to in the SPA and that the defendant was in breach of contract when it refused to perform the rights and obligations the parties expressly agreed to in the SPA. (paras 19-24)

(2) The plaintiff clearly suffered loss and damage by way of profit and benefit when it was deprived from the performance of the rights and obligations under the SPA, in particular the sale by the defendant and the purchase by the plaintiff of all the merchantable timber there under. In terms of profit and benefit, there was evidence through PW1 and PW4 that a profit of RM250 per ton was achievable. Their evidence revealed that 40 tons per acre of merchantable timber could be extracted from Lot 63. As such, their evidence had established that an area of 12,000 acres would give a total profit of RM120,000,000, *ie*, RM250 per ton x 40 tons per acre x 12,000 acres. Significantly, "merchantable timber" was timber that had commercial value which would fetch a price in the market from a buyer willing to buy such timber. It did not have to be of a certain minimum size or specification. (para 28)

(3) The trial judge's assessment of the plaintiff's loss of profit and benefit was based on the amount of merchantable timber on Lot 63 which could be extracted there from. It was the trial judge's specific finding of facts that 40 tons of merchantable timber was a realistic quantity that could be extracted per acre from Lot 63 had the obligations in the SPA been performed by the defendant. (para 29)

(4) The award of damages by the trial judge was primarily based on his finding of facts in the light of the evidence adduced at the trial. In light of the two conflicting versions given by the parties, he accepted the evidence adduced for the plaintiff and rejected the defendant's evidence. As a trier of facts, the trial

judge was entitled to do so. There was no reason to disturb his finding of facts. As there was no appealable error in the assessment of damages awarded by the trial judge, appellate interference was not warranted. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Syarikat defendan (perayu di sini) adalah pemilik berdaftar kepada sebidang tanah seluas lebih kurang 12,000 ekar yang dipegang di bawah Lot 63 di Daerah Tanah Sawai, Batang Suai, Miri Sarawak ('Lot 63'). Defendan memasuki satu perjanjian jual beli ('PJB') dengan syarikat plaintif (responden di sini) bagi plaintif membeli dan defendan menjual semua kayu balak yang boleh dikeluarkan dari Lot 63, tertakluk kepada lesen pembalakan ('lesen') yang dikeluarkan pihakberkuasa yang berkenaan. Fakta menunjukkan bahawa permohonan defendan untuk satu lesen pembalakan telah diluluskan oleh Pengarah Perhutanan Sarawak. Walau bagaimanapun, pemegang saham utama defendan kemudiannya telah membatalkan PJB atas alasan, antara lain, bahawa permohonan defendan untuk mendapatkan lesen telah ditolak oleh Kementerian Perancangan Sumber. Berikutnya plaintif memfail tindakan terhadap defendan di Mahkamah Tinggi atas kemungkiran kontrak. Hakim bicara memberikan penghakiman kepada plaintif untuk gantirugi berjumlah RM120,000,000 beserta dengan faedah, dan defendan telah merayu.

Diputuskan (menolak rayuan):
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua PJB dan lesen merujuk kepada tanah yang sama, iaitu Lot 63 serta halperkara yang sama, iaitu kayu-kayu balak yang boleh dijual. Kedua-dua dokumen harus dibaca secara konjunktif sejajar dengan pendekatan yang diambil oleh Mahkamah Rayuan di dalam *T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah*, iaitu bahawa di dalam transaksi di mana lebih dari satu dokumen atau instrumen terlibat, mahkamah kebiasaannya akan mentafsirkan dokumen-dokumen tersebut secara bersekali, dan di mana niat pihak-pihak telah diserlahkan dengan terang dan jelas, mahkamah akan memberi kesan kepadanya. Dengan mengikuti pendekatan konjunktif, hakim bicara betul dalam memutuskan bahawa lesen berada dalam rangkuman, skop dan maksud ungkapan "lesen pembalakan" seperti yang dirujuk di dalam

PJB, dan bahawa defendan telah memungkiri kontrak bilamana ia enggan melaksanakan hak-hak dan obligasi yang dipersetujui dengan jelas oleh pihak-pihak di dalam PJB.

(2) Plaintif jelas mengalami kerugian dan kemudaratan dari segi manfaat dan keuntungan bilamana ia tidak dapat melaksanakan hak-hak dan obligasi di bawah PJB, terutama penjualan oleh defendan akan semua kayu-kayu balak di bawah PJB tersebut dan pembeliannya oleh plaintif. Dari segi keuntungan dan manfaat, terdapat keterangan melalui SP1 dan SP4 bahawa keuntungan RM250 se tan adalah boleh dicapai. Keterangan mereka menunjukkan bahawa 40 tan kayu balak yang boleh dijual boleh diperoleh dari Lot 63. Oleh itu, keterangan mereka menunjukkan bahawa satu kawasan seluas 12,000 ekar akan memberikan keuntungan sebanyak RM120,000,000, iaitu 40 tan x RM250 x 12,000 ekar. Secara pentingnya juga, "kayu balak yang boleh dijual" adalah kayu-kayu balak yang mempunyai nilai komersial dan yang akan dibeli oleh pembeli di pasaran. Ia tidak memerlukan kepada suatu saiz atau spesifikasi minima.

(3) Taksiran hakim bicara terhadap kehilangan keuntungan dan manfaat plaintif adalah didasarkan kepada jumlah kayu balak yang boleh dijual dari Lot 63 yang boleh dikeluarkan darinya. Menjadi dapatan fakta spesifik hakim bicara bahawa 40 tan kayu balak yang boleh dijual adalah kuantiti yang munasabah yang boleh dikeluarkan dari se ekar Lot 63, sekiranya obligasi-obligasi di dalam PJB dilaksanakan oleh defendan.

(4) Award gantirugi hakim bicara adalah berasaskan kepada dapatan-dapatan fakta yang dibuatnya dengan mengambilkira keterangan-keterangan yang dikemukakan di perbicaraan. Memandangkan terdapat dua versi yang dikemukakan oleh pihak-pihak, beliau telah memilih keterangan yang diberikan oleh plaintif dan menolak keterangan defendan. Sebagai pengadil fakta, hakim bicara berhak berbuat demikian. Tiada alasan untuk mengganggu dapatan-dapatan faktanya itu. Oleh kerana tidak terdapat kekhilafan boleh dirayui dalam taksiran gantirugi yang diawardkan oleh hakim bicara, maka campur tangan peringkat rayuan adalah tidak wajar.

Case(s) referred to:
Amar Singh v. Chin Kiew [1960] 1 LNS 5 HC ***(refd)***
Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(refd)***
T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah [2009] 2 CLJ 160 CA ***(refd)***

For the appellant - Tan Thiam Teck (KY Lim & Joyce Chan with him); M/s Kadir, Wong, Lin & Co
For the respondent - Mohamad Ivan Hussein Advocates & Solicitors

[Appeal from High Court, Miri; Civil Suit No: MR 27-1995]

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 21 October 2009, after a full trial, the Miri High Court found the defendant company liable for breach of contract and gave judgment for the respondent ("the plaintiff company") in the sum of RM120,000,000 as damages with interest at 8% per annum.

[2] We heard the appellant's ("the defendant company's") appeal on 30 June and 1 July 2010. We dismissed it with costs of RM50,000. We now give our grounds.

The Facts

[3] This appeal is essentially fact-based.

[4] The defendant company is and was at all material times the registered proprietor of a parcel of land held under Lot 63, Sawai Land District ("Lot 63") Batang Suai, Miri containing an approximate area of 4,856 hectares (= 12,000 acres)

[5] On 20 April 1994, the parties herein entered into exh. P15 which is a timber Sale and Purchase Agreement ("the Timber SPA") for the sale by the defendant company to the plaintiff company of all the merchantable timber or logs to be extracted from the whole parcel of Lot 63. (A reference hereinafter to the word "timber" includes a reference to logs and *vice versa*).

[6] The Timber SPA is one of the three agreements which the parties entered into on 20 April 1994. The other two agreements are:

(1) An Agreement (exh. P13) for the sale of all the shares (in the defendant company) from the then shareholders *viz* Mr Ha Tiung Noon and his wife to the present shareholders for the sum of RM1.2 million. It was also agreed therein that the then shareholders shall cause the defendant company to enter into the Timber SPA with the plaintiff company for the sale of all the merchantable logs to be extracted from Lot 63; and

(2) A Deed whereby the then shareholders and the present shareholders agreed to acquire shares in the plaintiff company and the plaintiff company shall enter into the Timber SPA with the defendant company to purchase all the merchantable timber to be extracted from Lot 63 to be resold to third parties.

[7] Specifically, the Timber SPA contains recitals, *inter alia*, to the following effect:

(1) The defendant company has made an application to the relevant authorities for a timber licence to enable it to fell, extract and harvest all the merchantable timber from Lot 63; and

(2) The defendant company has agreed with the plaintiff company that upon the issue of a timber licence by the relevant authorities, the defendant company will sell to the plaintiff company all the merchantable timber extracted or to be extracted from Lot 63, upon the terms and conditions contained therein.

[8] Clause 1(a) of the Timber SPA expressly and specifically states that subject to the issue of the timber licence, the defendant company will sell and the plaintiff company will purchase all the extracted merchantable timber from Lot 63 that are marked by the relevant authorities during the licence period and any extension or renewal thereof from time to time. (A reference hereinafter to a clause is a reference to that clause in the Timber SPA).

[9] The defendant company, by letter dated 29 March 1994 to the Director of Forestry Sarawak, applied for a timber licence to fell and extract all merchantable timber from Lot 63.

[10] On 25 January 1995, the Director of Forestry Sarawak informed the defendant company that the latter's application to extract merchantable timber from 1,000 ha of Lot 63 has been approved.

[11] By letter dated 15 April 1995, the defendant company's controlling shareholders *viz* Mr Ha Tiung Noon and Madam Chan Yitt Fong wrote to the plaintiff company's chairperson, Madam Tan So Yin, purporting to unilaterally terminate the Timber SPA on the ground, *inter alia*, that Kementerian Perancangan Sumber ("the Ministry of Resource Planning") had rejected the defendant company's application for the issue of a timber licence; and so the defendant company took the position that the Timber SPA ceased to have effect.

[12] However, by letter dated 18 April 1995, the Section Forest Officer sent the original Occupation Ticket Licence No. OT/9004 (OT/9004) to the defendant for its retention. The original OT/9004 was also received by the plaintiff. OT/9004 was a "Licence To Take Forest Produce" which the Sarawak Forestry Department has issued to the defendant company to carry out clearing works over an area of 1,000 ha in Phase I of Lot 63 for a period of 12 months.

[13] As the defendant company had deprived the plaintiff company of the purchase of the merchantable timber logs from Lot 63, the plaintiff company commenced the suit in the High Court against the defendant company for breach of contract contained in the Timber SPA and claimed damages.

Timber Licence

[14] Learned counsel Mr Tan Thiam Teck (assisted by Mr K Y Lim and Ms Joyce Chan) submitted that OT/9004 is not the timber licence which the parties had contemplated in the Timber SPA (exh. P15); and so the defendant had not breached the terms and conditions thereof.

[15] Plaintiff company's learned counsel Mr Mohamad Ivan bin Hussein supported the decision of the learned trial judge and argued that OT/9004 was such a timber licence, in which case exh. P15 was operative and valid.

[16] In essence, the learned trial judge held that the Timber SPA in exh. P15 was valid and enforceable, on the ground that OT/9004 "could come within the meaning of a timber licence under exh. P15"; and the defendant "was in breach of exh. P15 when it refused to allow exh. P15 to be performed when OT/9004 was issued, being a type of timber licence".

[17] In the light of the above submissions and the decision of the High Court, the question raised for us to answer is:

> Upon the issuance by the relevant authorities of OT/9004, was the defendant company in breach of the Timber SPA in Exh P15 when the defendant company unilaterally terminated the Timber SPA in Exh P15 and refused to allow the Timber SPA in Exh P15 to be performed?

[18] The answer to the above question may be ascertained by a careful consideration and comparison of the Timber SPA in exh. P15 and the licence in OT/9004.

[19] In our judgment, it is significant to note both exh. P15 and OT/9004 expressly refer to the same parcel of land ie, Lot 63. Phase I consisting of 1000 ha is part and parcel of the 4,856 ha (= 12,000 ac) in Lot 63 which is the subject matter of the Timber SPA in exh. P15.

[20] The timber licence contemplated by the plaintiff company and the defendant company in exh. P15 is to enable the defendant company to fell, extract and harvest all the merchantable timber from Lot 63. Likewise, OT/9004 authorizes the defendant to take and move such forest produce described therein ie, "all species of forest produce except belian." There was also no girth limit of the size of trees.

[21] Exhibit P15 requires the defendant company (as vendor) to sell to the plaintiff (the purchaser) all the merchantable timber extracted or to be extracted from the same land ie, Lot 63. Similarly, special condition 2 of OT/9004 provides for the extraction of timber in the 1,000 ha of Phase I within Lot 63.

[22] We have no doubt whatsoever that both exh. P15 and OT/9004 refer specifically to the same subject matter ie, merchantable timber, indeed all species of forest produce and timber except belian, extracted or to be extracted from the same parcel of land.

[23] As a matter of pure construction, both these documents *viz.* exh. P15 and OT/9004 must be read conjunctively, in line with the approach taken by this court in *T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan dan Lindungan Tanah* [2009] 2 CLJ 160 ie, in transactions where more than one document or instrument is involved, the courts would usually construe those documents together, and where the parties' intention is clearly and unequivocally expressed, the courts will give effect to it.

[24] When the above conjunctive approach is adopted in the instant appeal, we have no difficulty in concurring with the learned trial judge who is correct in holding that "The Licence to Take Forest Produce" in OT/9004 is within the ambit, scope and meaning of the "timber licence" in exh. P15, and that the defendant is in breach thereof when the defendant refused to perform the rights and obligations which the parties have expressly agreed under cl. 1(a) as alluded to above ie, to sell all the extracted merchantable timber from Lot 63 to the plaintiff company. The defendant company is legally bound to sell all the merchantable timber extracted or to be extracted from the whole parcel of Lot 63 ie, 12,000 ac. The defendant company is liable to the plaintiff company for the breach thereof when the defendant unilaterally terminated the Timber SPA. The answer to the above question is therefore in the affirmative.

Award Of Damages

[25] It was stressed for the defendant company that the learned trial judge had erred in awarding the damages of RM120,000,000 to the plaintiff company which was said to have failed to prove either the fact of damage or the amount of damages.

[26] The position taken for the plaintiff company is that the quantum of damages awarded by the learned trial judge is free from any error and so this court should not interfere.

[27] Under this head, we have to decide whether the assessment of damages awarded by the High Court is supportable and justifiable.

[28] It is plain to us that the plaintiff had suffered loss and damage, by way of profit and benefit flowing from the performance of the rights and obligations under exh. P15, in particular the sale by the defendant company and the purchase by the plaintiff

company of all the merchantable timber thereunder. PW1 and PW4 testified for the plaintiff company that they had visited Lot 63 to conduct their field survey. In terms of profit and benefit, there was evidence through PW1 and PW4 that a profit of RM250 per ton was achievable. Their evidence revealed that 40 tons per acre of merchantable timber could be extracted from Lot 63. Their evidence has also established that an area of 12,000 ac would give a total profit of RM120,000,000, ie, RM250 per ton x 40 tons per ac x 12,000 ac. In our judgment, "merchantable timber" means timber which has commercial value, and would fetch a price in the market from a buyer willing to buy such timber, and it does not have to be of a certain minimum size or specification.

[29] The learned trial judge has also considered the evidence of witnesses who testified for the defendant company that only a few trees of small sizes (poles) were left on Lot 63 and the conflicting testimonies of both parties and the surrounding circumstances in order to establish the balance of probabilities, which is the standard of proof required in civil cases. He then made a finding that there were merchantable logs to be extracted from Lot 63, and had rejected the evidence adduced for the defendant company. The learned trial judge's assessment of the plaintiff company's loss of profit and benefit is based on the amount of merchantable timber on Lot 63, which can be extracted therefrom. It is the learned trial judge's specific finding of facts (based on the audio visual advantage available to him) that 40 tons of merchantable timber is a realistic quantity that could be extracted per acre from Lot 63 had the obligations in exh. P15 been performed by the defendant company.

[30] The award of damages by the learned trial judge is primarily based on his finding of facts in the light of the evidence adduced at the trial. In the light of two conflicting versions, he has accepted the evidence adduced for the plaintiff company and rejected the defendant's evidence. As a trier of facts, the learned trial judge is entitled to do so. There is no reason for us to disturb his finding of facts. We also see no appealable error in the assessment of damages awarded by him. Hence it does not justify any appellate interference.

[31] In *Amar Singh v. Chin Kiew* [1960] 1 LNS 5, Thomson CJ stated succinctly as follows:

> The fixation of damage is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent, an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

[32] A similar sentiment was shown by this court in *Bank Utama (Malaysia) Berhad v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221, in the following passage:

> [88] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; (ii) that the findings were clearly wrong in law and principle. (per Hasan Lah JCA)

Conclusion

[33] On the foregoing grounds, we found no merit in this appeal which we dismissed with costs of RM50,000, after hearing respective learned counsel's submission thereon. The decision of the High Court was affirmed. Deposit to the plaintiff (respondent) on account of the fixed costs.